

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD M. CASS,

Plaintiff,

v.

CAROLYN W COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 3:16-CV-05021-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff Richard M. Cass filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of his application for supplemental security income ("SSI"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 6.

After considering the record, the Court concludes the Administrative Law Judge ("ALJ") erred when he failed to provide specific and legitimate reasons supported by substantial evidence for giving limited weight to the medical opinion of Dr. Rogelio Zaragoza, M.D. Had the ALJ properly considered Dr. Zaragoza's opinion, the residual functional capacity may have included additional limitations. The ALJ's error is therefore harmful, and this matter is reversed and

ORDER REVERSING AND REMANDING
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1 remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner of Social
2 Security (“Commissioner”) for further proceedings.

3 FACTUAL AND PROCEDURAL HISTORY

4 On November 5, 2002, Plaintiff was found disabled as of August 1, 2002. *See* Dkt. 7,
5 Administrative Record (“AR”) 12. On April 19, 2010, the Commissioner determined Plaintiff
6 was no longer disabled. *Id.* The Commissioner’s determination was upheld upon reconsideration.
7 *Id.* A hearing was held before ALJ David Johnson on February 5, 2014. *See* AR 31-56. In a
8 decision dated March 28, 2014, the ALJ determined Plaintiff’s disability ended on April 1, 2010
9 and found Plaintiff has not become disabled since that date. *See* AR 12-26. Plaintiff’s request for
10 review of the ALJ’s decision was denied by the Appeals Council, making the ALJ’s decision the
11 final decision of the Commissioner. *See* AR 1-6; 20 C.F.R. § 404.981, § 416.1481.

12 In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ committed harmful error by
13 failing to give proper weight to the opinion of examining psychiatrist Dr. Rogelio Zaragoza,
14 M.D. Dkt. 9, p. 1.

15 STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
17 social security benefits if the ALJ’s findings are based on legal error or not supported by
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
19 Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

20 DISCUSSION

21 **I. Whether the ALJ erred in rejecting the medical opinion of Dr. Rogelio** 22 **Zaragoza, M.D.**

23 Plaintiff contends the ALJ erred in his evaluation of the opinion evidence submitted by
24 examining psychiatrist Dr. Rogelio Zaragoza, M.D. Dkt. 9, pp. 2-6.

1 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
 2 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
 3 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d
 4 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the
 5 opinion can be rejected “for specific and legitimate reasons that are supported by substantial
 6 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,
 7 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
 8 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
 9 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
 10 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

11 A. Dr. Zaragoza’s Findings

12 On March 6, 2010, Dr. Zaragoza completed an evaluation of Plaintiff’s mental
 13 limitations. *See* AR 246-49. Dr. Zaragoza interviewed and observed Plaintiff, and conducted a
 14 mental status examination (“MSE”) of Plaintiff. *See* AR 246-49. After completing the
 15 evaluation, Dr. Zaragoza diagnosed Plaintiff with major depressive disorder with psychotic
 16 features and scoliosis. AR 248. Dr. Zaragoza found Plaintiff’s “problem is treatable” and his
 17 “likelihood of recovery is fair.” AR 248. He opined Plaintiff is capable of: managing his own
 18 funds, performing simple and repetitive tasks and detailed and complex tasks, accepting
 19 instruction from supervisors, and interacting with coworkers and the public. AR 249. Dr.
 20 Zaragoza found Plaintiff unable to: maintain regular attendance in the workplace, complete a
 21 normal workday or workweek without interruptions from his psychiatric condition, and deal with
 22 usual work related stress at this time. AR 249. He also opined Plaintiff’s depressive symptoms
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1 appear to impair his ability to perform work activities on a consistent basis. AR 249. Dr.
 2 Zaragoza noted Plaintiff was not currently on any medication. AR 249.

3 B. ALJ's Findings

4 After discussing Dr. Zaragoza's opinion, the ALJ found:

5 (1) Dr. Zaragoza's opinions regarding the claimant's mental
 6 functional limitations are inconsistent with the opinions of other
 7 medical experts including Drs. Moreno and Fisher, both of whom
 8 found that the claimant would be able to tolerate the stressors of
 9 basic work activities despite his impairments. (2) Dr. Zaragoza did
 10 not have the opportunity to review subsequent treatment records,
 11 which indicate that the claimant was feeling significantly better,
 12 and was interested in pursuing additional social activities. (3) He
 13 was also not aware of the role of substance abuse in the claimant's
 14 limitations. (4) Further, Dr. Zaragoza noted the claimant was not
 15 taking any medication at the time of the examination. Accordingly,
 16 the undersigned affords some limited weight to this opinion, but
 17 finds that Dr. Zaragoza's opinion is more restrictive than is
 18 warranted by the evidence considered as a whole.

12 AR 24 (numbering added).

13 First, the ALJ found Dr. Zaragoza's opinion was inconsistent with the opinions of Drs.
 14 Moreno and Fisher. AR 24. The ALJ did not explain why the opinions of Drs. Moreno and
 15 Fisher are more persuasive than Dr. Zaragoza's opinion. *See* AR 24. The ALJ only stated Drs.
 16 Moreno and Fisher reached a different conclusion regarding Plaintiff's ability to tolerate work
 17 related stressors. *See* AR 24. As stated above, when a treating or examining physician's opinion
 18 is contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported
 19 by substantial evidence in the record." *Lester*, 81 F.3d at 830-31. The fact Dr. Zaragoza's
 20 opinion is inconsistent with two other opinions in the record shifts the standard of review for
 21 giving less weight to Dr. Zaragoza's opinion from clear and convincing to specific and legitimate
 22 reasons, but does not eliminate the need for the ALJ to provide a proper reason to reject his
 23 opinion. Accordingly, the ALJ's first reason for giving limited weight to Dr. Zaragoza's opinion
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1 is not legitimate.¹ *See Garrison v. Colvin*, 759 F.3d 995, 1012-13 (9th Cir. 2014) (an ALJ errs
2 when he rejects a medical opinion or assigns it little weight when asserting without explanation
3 another medical opinion is more persuasive).

4 Second, the ALJ gave limited weight to Dr. Zaragoza's opinion because Dr. Zaragoza did
5 not have an opportunity to review subsequent treatment records indicating Plaintiff was feeling
6 significantly better and was interested in pursuing additional social activities. AR 24. The ALJ
7 did not to explain why Dr. Zaragoza's failure to review subsequent records discredits his
8 opinion. *See* AR 24. Dr. Zaragoza did not find Plaintiff had social limitations. For example, Dr.
9 Zaragoza opined Plaintiff can accept instructions from supervisors and interact with coworkers
10 and the public. *See* AR 249. Thus, it is unclear why subsequent treatment notes showing
11 Plaintiff was feeling better and interested in pursuing additional social activities discredits Dr.
12 Zaragoza's opinion.

13 Further, Dr. Zaragoza relied on his own observations, results from the MSE he
14 administered, and Plaintiff's reported mental health history and subjective complaints to reach
15 his opinion of Plaintiff's functional limitations. AR 246-49. Defendant does not cite, nor does
16 the Court find, authority holding an examining physician's failure to supplement his own
17 examination and observations with additional records is, alone, a specific and legitimate reason
18 to give less weight to the opinion. *See* Dkt. 10. Accordingly, the Court finds the ALJ's second
19 reason for giving limited weight to Dr. Zaragoza's opinion is not specific and legitimate and
20 supported by substantial evidence.

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23 ¹ The Court also notes Dr. Moreno performed a physical evaluation of Plaintiff, recommending Plaintiff
24 undergo a mental health evaluation and deferring to the mental health assessment regarding Plaintiff's bi-polar
disorder. AR 360. Thus, the ALJ's reliance on Dr. Moreno's opinion regarding mental health limitations is not
supported by substantial evidence.

1 Third, the ALJ gave limited weight to Dr. Zaragoza's opinion because Dr. Zaragoza
2 was not aware of the role of substance abuse in Plaintiff's limitations. AR 24. The record shows
3 Plaintiff has a history of substance abuse. *See* AR 39-41, 47-50 (Plaintiff's testimony regarding
4 his drug and alcohol use, including court-ordered treatment). During his evaluation with Dr.
5 Zaragoza, Plaintiff denied abusing drugs or alcohol and admitted to drinking beer occasionally,
6 once or twice a month. AR 247. Therefore, Plaintiff was not honest with Dr. Zaragoza regarding
7 his substance abuse. However, under "Review of Records," Dr. Zaragoza stated he reviewed
8 records as to the "allegation of affective disorder, substance addiction and back." AR 246. Thus,
9 the record indicates Dr. Zaragoza reviewed records regarding Plaintiff's substance abuse and was
10 aware of Plaintiff's substance abuse when he opined to Plaintiff's functional limitations.

11 Additionally, the ALJ fails to explain why Dr. Zaragoza's alleged lack of knowledge
12 regarding Plaintiff's substance abuse impacts his opinion. *See* AR 24. The ALJ did not find
13 Plaintiff's drug or alcohol abuse was a severe impairment, and thus, the ALJ did not find
14 Plaintiff's use of drugs or alcohol impacted his ability to work. *See* AR 13. Further, the record
15 shows Plaintiff had discontinued his drug and alcohol abuse and demonstrated no current
16 evidence of associated limitations. *See* AR 22, 315, 369. As there is no evidence of any
17 limitations associated with Plaintiff's history of drug and alcohol abuse, it is unclear why the
18 ALJ gave less weight to Dr. Zaragoza because Dr. Zaragoza was allegedly unaware of Plaintiff's
19 history of drug and alcohol abuse. *See Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003)
20 ("We require the ALJ to build an accurate and logical bridge from the evidence to her
21 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate
22 findings.").

1 As the record shows Dr. Zaragoza was aware of Plaintiff's substance abuse and as the
2 ALJ failed to properly explain the significance of Dr. Zaragoza's alleged lack of knowledge
3 regarding Plaintiff's drug and alcohol abuse, the Court finds the ALJ's third reason for giving
4 limited weight to Dr. Zaragoza's opinion is not supported by substantial evidence.

5 Fourth, the ALJ gave Dr. Zaragoza's opinion limited weight because Dr. Zaragoza noted
6 Plaintiff was not taking any medication at the time of the examination. AR 24. The ALJ,
7 however, fails to explain why the fact Plaintiff was not taking medications detracts from Dr.
8 Zaragoza's credibility. *See* AR 24. Moreover, the record does not support finding Plaintiff's
9 functional limitations are improved with medication. In finding Plaintiff lacked credibility, the
10 ALJ stated "it does appear that medications and treatment improve [Plaintiff's] condition"
11 because the consultative examiners expected his condition to improve with treatment. AR 20.
12 The record does not show the medical examiners found Plaintiff's conditions would improve
13 with medication. *See id.* Rather, the medical examiners noted Plaintiff may improve with
14 counseling. *See* AR 249 (Plaintiff's conditions should improve with treatment); 291
15 (recommending Plaintiff continue with intensive, consistent therapy); 347 (finding Plaintiff's
16 prognosis poor and finding he would benefit from counseling). Further, Plaintiff reported his
17 depression symptoms were the same with or without medications. AR 246. The record does not
18 support the ALJ's conclusion that Dr. Zaragoza's opinion should be given limited weight
19 because Plaintiff was not on medication at the time of the evaluation. Accordingly, the Court
20 finds the ALJ's fourth reason for giving limited weight to Dr. Zaragoza's opinion is not
21 supported by substantial evidence.

1 For the above stated reasons, the Court concludes the ALJ failed to provide specific and
 2 legitimate reasons supported by substantial evidence for giving limited weight to the opinion of
 3 Dr. Zaragoza. Accordingly, the ALJ erred.²

4 “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674
 5 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
 6 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
 7 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
 8 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific
 9 application of judgment” by the reviewing court, based on an examination of the record made
 10 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at
 11 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

12 Had the ALJ properly considered Dr. Zaragoza’s opinion, he may have included
 13 additional limitations in the residual functional capacity assessment (“RFC”) and in the
 14 hypothetical questions posed to the vocational expert, Joseph Moisan. For example, Dr. Zaragoza
 15 opined Plaintiff is unable to maintain regular attendance in the workplace, complete a normal
 16 workday or workweek without interruptions from his psychiatric condition, or deal with usual

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 18 ² Defendant asserts the ALJ properly discounted Dr. Zaragoza’s opinion because the opinion was based on
 19 Plaintiff’s subjective reports, which the ALJ properly rejected. Dkt. 11. The ALJ did not state he was giving limited
 20 weight to Dr. Zaragoza’s opinion because it was based on Plaintiff’s subjective reports. *See* AR 24. The Court
 21 cannot “affirm the decision of an agency on a ground the agency did not invoke in making its decision.” *Stout v.*
 22 *Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006). “Long-standing principles of administrative law
 23 require us to review the ALJ’s decision based on the reasoning and actual findings offered by the ALJ - - not *post*
 24 *hoc* rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554
 F.3d 1219, 1225-26 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
 omitted)); *see also Molina*, 674 F.3d at 1121 (“we may not uphold an agency’s decision on a ground not actually
 relied on by the agency”). As the ALJ did not discredit Dr. Zaragoza’s opinion because the opinion was based on
 Plaintiff’s subjective complaints, the Court cannot rely on this reason to affirm the ALJ’s decision. The Court also
 notes Dr. Zaragoza’s opinion was based on his own observations, results from the MSE he administered, and
 Plaintiff’s reported mental health history and subjective complaints. *See* AR 246-49. Therefore, the Court finds Dr.
 Zaragoza’s opinion was not primarily based on Plaintiff’s subjective reports of his symptoms. *See Ghanim v.*
Colvin, 763 F.3d 1154, 1162 (9th Cir. 2014) (“[W]hen an opinion is not more heavily based on a patient’s self-
 reports than on clinical observations, there is no evidentiary basis for rejecting the opinion.”).

1 work related stressors. AR 249. The ALJ did not include any of these limitations in the RFC.
2 *See* AR 15. Thus, the ultimate disability determination may change if Dr. Zaragoza's limitations
3 are included in the RFC and in the hypothetical questions posed to the vocational expert.
4 Accordingly, the ALJ's error is not harmless and requires reversal.

5 CONCLUSION

6 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
7 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
8 this matter is remanded for further administrative proceedings in accordance with the findings
9 contained herein.

10 Dated this 14th day of June, 2016.

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12 David W. Christel
13 United States Magistrate Judge
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